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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

IN RE EVELYN WILLIAMS, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Evelyn Williams respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered July 29, 1974, which affirmed petitioner's summary conviction for criminal contempt.

OPINIONS BELOW

The District Court's Certificate of Contempt dated December 5, 1973, its Memorandum Decision of January 4, 1974, and its Judgment and Committment dated February 5, 1974, have not been officially reported but are printed as Appendices A, B and C, respectively, hereto. The opinion and judgment of the Court of Appeals affirming the order of the District Court is officially reported at 500 F.2d 403 and is printed as Appendix D hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 19, 1974 (App. D). A timely petition for rehearing was filed on August 8, 1974, and was denied by that court on September 13, 1974 (App. F). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney was denied due process under the Fifth Amendment when a judge found her in criminal contempt for one act during trial, put off sentencing until after trial, then certified as contemptuous a different set of acts—all without giving the attorney any opportunity to offer evidence in her own behalf.

2. Whether petitioner was entitled under the Due Process Clause of the Fifth Amendment to have her criminal contempt heard by a different judge when the trial judge had been so vilified by the defendants, and had become so personally embroiled in controversy, that he could not render a fair and impartial judgment of summary contempt.

3. Whether petitioner was denied due process under the Fifth Amendment by being convicted of contempt without being sufficiently informed of the criminal charges against her and when no actual or imminent obstruction of justice was charged or was present.

STATEMENT OF THE CASE

Petitioner, as a member in good standing of the Bar of the State of New York, has been a practicing attorney in New York City for fifteen years. Prior to the incidents involved in this case, she had never been in any difficulty with any court in any jurisdiction.

At the time of the relevant incidents, petitioner represented one Joanne Chesimard, who was under a three-

count indictment in the Southern District of New York for armed bank robbery and conspiracy to rob. In addition, Chesimard was under indictment in New Jersey for murder, assault with intent to kill, atrocious assault, illegal possession of weapons, and armed robbery; in the Eastern District of New York for bank robbery; and in Kings County, New York, for both felony-murder and kidnapping robbery (Ct. App. Tr. 73.).[1] Her co-defendant in the Southern District of New York case was one Freddie Hilton.[2]

Because of the pendency of the New Jersey case, Judge Gagliardi granted a postponement of the Southern District of New York case on condition that the New Jersey case begin by October 9, 1973. The New Jersey case did in fact begin on that date, but the jury was discharged some two weeks later for failure to obtain an impartial panel.[3] The New Jersey court then granted a change of venue to another county within the State, and petitioner and her client began preparing for the resumption of trial.

At this point, however, Judge Gagliardi set December 3, 1973, as the beginning of the Southern District

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[1] The printed record in the Court of Appeals, a copy of which has been lodged with the Clerk of this Court, was not consecutively paginated. Miscellaneous pages are therefore hereinafter cited as "Ct. App. Tr. —", while pages for particular days are cited by reference to the relevant date—*e.g.*, "12/5/73 Tr. —."

[2] In addition to the charge in the Southern District of New York, Hilton was under indictment in Bronx County, New York, for attempted murder and in Kings County, New York, for both attempted murder and possession of a dangerous weapon (Ct. App. Tr. 73).

[3] One of Judge Gagliardi's complaints, stated several times (Ct. App. Tr. 82a, 83a), was that he had not been advised of the mistrial in the New Jersey case. At one point, after expressing how "extremely disappointed" he was, he told petitioner: "it is not going to be taken out on you or your client * * *" (*id.* at 82a).

trial, despite strong and repeated protests by petitioner and Robert Bloom, the attorney representing co-defendant Hilton, that they were not and could not be prepared to proceed in view of the pendency of multiple motions and other matters in New Jersey. The Court of Appeals denied petitions for mandamus on December 3 (Ct. App. Tr. 41a), and the next day petitioner and her client appeared for trial. Petitioner and Bloom again protested that they were totally unprepared (12/4/73 Tr. 9-10, 15, 19-20, 25-27, 35-38).

Before the jury had even been called, the defendant Chesimard began making statements in open court (*id.* at 39). Thereafter, both in and out of the presence of the jury, Chesimard continued to interrupt the court and counsel, so that *on six separate occasions she had to be forcibly removed from the courtroom* (*id.* at 44, 63-64, 72, 79-82; 12/5/73 Tr. 30-31, 41-44). For awhile, her outbursts were relatively mild. She charged that she was being "railroaded" (12/4/73 Tr. 69; see also *id.* at 40, 41, 42, 43, 71; 12/5/73 Tr. 28); that she was "listening to nonsense" (12/4/73 Tr. 40); that the trial was being conducted "in an unfair manner" (*id.* at 42; see also *id.* at 43); that the judge had "done everything conceivable to obstruct justice" (*id.* at 43); that the court had "made a deal *** with the prosecution" (*id.*); that unlike Maurice Stans and others who were treated "like they was an embassy of the White House," the defendants here were "treated by grand executors [sic]" (*id.* at 64; see also 12/5/73 Tr. 27); that there was "no justice in this court" (12/4/73 Tr. 64); that the court was "violating the laws of humanity, the rules of justice" (*id.* at 71), and that the defendant was being "lynched" (*id;* see also *id.* at 72, 77).

At a certain point in the trial, however, after the defendants had already been removed from the courtroom on three occasions, attacks on the court by both de-

fendants became more vituperative and more personal. For example, they charged:

> DEFENDANT CHESIMARD: How can you ask me to remain silent when you have made deals, when I see that you are corrupt, that you are bigoted, and I see that you are bought and paid for? * * * [*Id.* at 71.]
>
> * * *
>
> DEFENDANT CHESIMARD: *** You have refused to make — a two-year-old baby — you call yourself a judge, but a two-year-old baby can understand that if someone is not prepared to go to trial— * * * [Y]ou act so unintelligent * * * [*Id.* at 75-76.]
>
> * * *
>
> DEFENDANT CHESIMARD: *** You were paid and bought, and you are an agent of them. You have no interest in justice. You have no interest in anything except a railroad. [*Id.* at 79.]
>
> * * *
>
> DEFENDANT CHESIMARD: *** I would like to know why this Court has been so unfair and insane throughout the proceedings of this trial. * * *
>
> Now, what you are doing is insane. When it comes down to Mitchell you act like an errand boy, and when it comes down to us you act like an executioner.
>
> *** You haven't got enough sense to judge us— *** Don't direct me. You need to direct yourself to have more sense ***. I am going to be the Damn Judge, not you—[12/5/73 Tr. 27.]
>
> * * *
>
> DEFENDANT CHESIMARD: *** This is insanity. This is insane, this is wrong, this is injustice. You are a racist ***. [*Id.* at 30.]
>
> * * *
>
> DEFENDANT HILTON: We are not going to have a trial. This is a circus. I don't give a fuck. [*Id.* at 32.]
>
> * * *

> DEFENDANT HILTON: There is no possible way to have a fair trial, and I ain't going to be quiet. Fuck you man—[*Id.* at 43.]

Throughout these proceedings, petitioner attempted without success to silence her client and to prevent further outbursts (see n. 10, *infra*).

Petitioner was faced with a difficult choice as a result of these developments. Not only was she unprepared because of the concurrent New Jersey matters, but she was now being forced to proceed without the presence of her client, as a result of Chesimard's repeated removal from the courtroom. On top of this, petitioner was outraged by the marshals' physical mistreatment of her client, who was seated throughout the trial in a wheelchair with a bullet in her chest, her median nerve severed (see n. 7, *infra*). Finally, the court was repeatedly attempting (we believe improperly) to place upon *counsel* the decision as to whether the defendants should be gagged or removed—a decision they were unwilling to make (12/4/73 Tr. 78-83).

It was against this confused, volatile and uncontrolled background that petitioner refused to participate further and left the courtroom on December 4 (*id.* at 87). Although the judge stated that "I intend to take the necessary proceedings in connection with your contumacious conduct to this Court" (*id.*), he did not in fact take any such steps at that time.

The next day, December 5, petitioner did not appear in the morning but did appear in the afternoon pursuant to specific court order (12/5/73 Tr. 2, 67-68). There then followed a lengthy and disputive argument about whether petitioner was still representing Chesimard. The court, in the meantime, had appointed additional counsel, in the event such counsel might be needed (12/4/73 Tr. 90, 93; 12/5/73 Tr. 4-10.) Petitioner reported that Chesimard would have no counsel

other than her, that petitioner continued to consider herself Chesimard's counsel, but that at the same time petitioner felt she could not adequately represent Chesimard under the prevailing conditions (*id.* at 2-12). Petitioner spoke with her client, who was not at that time allowed in the courtroom (*id.* at 15-17), and then again applied to the court for a postponement of the trial (*id.* at 20-22). She informed the court that if her motion was denied (which it was), she would be forced to stand mute and not participate in the trial (*id.* at 21).

Despite this statement, the selection of jurors did proceed, and petitioner continued to participate. However, when both defendants' outbursts continued and they were twice more removed (*id.* at 27-45), petitioner pointed out to the court that she was "totally exhausted by these various incidents" (*id.* at 45), that the court should recognize that Chesimard was on trial for her life in New Jersey, that Chesimard felt she could not receive a fair trial in New York when proper preparation was totally lacking, and that petitioner strongly objected to her client's absence from the courtroom (*id.* at 45-51). Despite a direction from the court, petitioner refused to be seated "without the presence of the defendants whose lives, whose liberty is in jeopardy in this case without their presence in this court ***" (*id.* at 51).

The following then transpired:

> MS. WILLIAMS: I will defend the Defendant Chesimard until she, in fact, replaces me. I will not have her discussed or any presentation made as to legal matters related to her in her absence.
>
> THE COURT: I direct you to return to the counsel table.
>
> MS. WILLIAMS: I will not return to the counsel table—
>
> THE COURT: Ms. Williams —
>
> MS. WILLIAMS: — under these circumstances —

THE COURT: Ms. Williams, your failure —

Ms. WILLIAMS: — unless the defendant Chesimard is here to listen —

THE COURT: Ms. Williams, your failure to obey my instructions may result in your being cited for contempt.

Ms. WILLIAMS: I am aware of that.

THE COURT: Do you wish to purge yourself of the possibility of being held in contempt.

Ms. WILLIAMS: I will purge myself, your Honor, of nothing except a proper defense of my client.

THE COURT: I direct you to return to the counsel table.

Ms. WILLIAMS: I will do anything, you know, to purge myself of an improper defense of my client.

THE COURT: Will you return to the counsel table?

Ms. WILLIAMS: I will not, your Honor, sit at that counsel table in the absence of the defendant.

THE COURT: Do you have anything to say in defense of your contumacious conduct in this court?

Ms. WILLIAMS: Of the what?

THE COURT: Of your contumacious conduct in this court?

Ms. WILLIAMS: I do not accept your characterization of my conduct as contumacious.

THE COURT: I find that you have failed to obey the legal order and directive of this Court, and I therefore, hold you in contempt.

Ms. Williams, return to the counsel table.

Ms. Williams —

Ms. WILLIAMS: I heard you, your Honor.

THE COURT: — return to the counsel table.

Ms. WILLIAMS: I will not, unless the Defendant Chesimard is present with me at the counsel table. At that point I will return.

THE COURT: The Defendant Chesimard will be present at the counsel table whenever she has indicated she will comport herself in such a way that this court may properly proceed with the business before it.

Ms. WILLIAMS: Well, then, I would suggest that your Honor give me an opportunity to again discuss with my client whether she can, in fact, comport herself, as your Honor calls it, in good behavior.

THE COURT: All right.

Ms. WILLIAMS: I will not participate—

THE COURT: All right, you may have five minutes in which to talk to her.

THE MARSHALL: Ms. Williams, down this way. [*Id.* at 53-55.]

Petitioner thus left the courtroom with the court's permission. After a recess, there was further discussion between counsel and the court, and then the trial was recessed for the day (*id.* at 60-68). The trial thereafter proceeded to its conclusion: a hung jury.

When petitioner appeared for sentencing on December 18, almost two weeks after the original incident, she was served with a Certificate of Contempt which had been prepared by Judge Gagliardi (see App. B, p. 4a). Although, as noted above, the judge had indicated during the trial that the only ground of contempt was petitioner's attempt to leave the courtroom in violation of a court order to remain at counsel table (12/5/73 Tr. 53-54),[4] the Certificate—which was the binding and formal adjudication of contempt—went far beyond a charge of this single contemptuous act. It charged in addition that "the *acts, statements and conduct* of [petitioner] ***, hereinafter specified, constitute a contempt ***"; that "Despite warnings ***, Ms. Williams persisted in her disruptive and contumacious behavior"; that "no single reference or series of references

[4] This position was reiterated in a later memorandum decision in which the judge stated that petitioner "was held in contempt for attempting to leave the courtroom during the course of jury selection in the Chesimard-Hilton trial and in violation of a direct order by the court to remain at counsel table" (App. B, p. 5a).

to the transcript can accurately reflect the extent of Ms. Williams' contemptuous conduct ***"; that "the entire record of the trial" had to be made "a part of these [contempt] proceedings"; that "*In addition to* the specific conduct set forth below and in the portions of the transcript appended hereto the Court notes that Ms. Williams had continually, during the course of the trial, conducted herself in a manner at times calculated to display her disrespect for this Court and these proceedings"; that petitioner at one point "announced that she would not submit to the direction of the Court" concerning the form in which objections were to be made in the presence of the jury; that at another point "Ms. Williams left the courtroom"; that on one occasion "Ms. Williams did not appear"; that she told the court in regard to one matter that "she would not listen to any statement made by the court ***"; and that, in summary, "by her *acts, statements and conduct,*" petitioner committed "acts of contempt ***" (App. A; emphasis added throughout).

Petitioner was sentenced to ten days in jail (App. C).

Both at her sentencing and on the following day, petitioner moved to vacate the contempt certificate and to assign the cause to another judge for trial by jury. This motion was denied in a Memorandum Decision issued two months after the incidents at trial (App. B).

The Court of Appeals affirmed petitioner's conviction (App. D).

REASONS FOR GRANTING THE WRIT

1. It was a denial of due process for Petitioner not to have been given a hearing, with an opportunity to present evidence, before being found guilty and sentenced for criminal contempt.

The District Court found petitioner guilty of criminal contempt during the course of trial and, after the

trial came to an end, sentenced her to ten days in prison. This procedure violated her constitutional right to due process. Whatever justification remains for a trial court summarily to find guilt and to sentence for contempt during trial, that justification disappears under the particular facts of this case.

First, it is clear that the ultimate contempt settled upon by the trial judge after the trial and at the time of sentencing was much broader than that relied upon at the time when petitioner was originally cited. As detailed above, the contemptuous act cited at trial was a refusal to return to counsel table, whereas the Certificate of Contempt set forth an entire series of "acts, statements and conduct" as constituting the contempt. It would be absurd in the light of the Certificate to say that the contempt found during trial was of a summary nature or was in any way self-contained, final or irredeemable, so that no hearing was practical. Clearly, as shown by the Certificate, the entire course of events both before and after the "finding" of contempt influenced the ultimate finding and the sentence. It was certainly not too late or impractical after trial to afford petitioner the kind of hearing that this Court has said is necessary in all but the most extraordinary circumstances. On the contrary, after trial but prior to sentencing an impartial and detached judge presumably could have been persuaded not only as to the sentence but as to the fact of contempt—just as a trial judge often orders acquittal after a jury verdict but prior to the imposition of sentence.

The necessity for a hearing and for petitioner to be given an opportunity to prove extenuating circumstances was particularly acute in this case, for there could have been any number of ameliorating facts which petitioner might have shown and which would have obviated any showing of criminal intent. For example:

—As a result of the various trials, hearings, motions, etc., involving petitioner's client in this case as well as other matters, petitioner obviously was both physically and mentally exhausted at the time of the alleged contempt.[5]

—Both the defense lawyers and their clients had obviously reached the honest conclusion—rightly or wrongly—that Judge Gagliardi was being unfair, under all the circumstances, to force the defendants to trial when they and their attorneys were totally unprepared.[6]

—Petitioner's actions occurred in the midst of raucous outbursts by the two defendants, their repeated removal from the courtroom, and harmful physical handling of petitioner's client by federal marshals.[7]

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[5] *E.g.*, see 11/28/73 Tr. 29a, 35a, 36a-37a; 12/5/73 Tr. 45a; 12/4/73 Tr. 19.

[6] *E.g.*, see 12/4/73 Tr. 27, 36.

[7] The strident outbursts by the defendants have been referred to in the Statement of the Case, above. The following reflects the handling by the marshals:

> MISS WILLIAMS: Your Honor, this is a sick woman. This woman has a bullet in her chest. She has a severed median nerve. There is nothing to justify five people dragging her out of this courtroom. [12/4/73 Tr. 44.]
>
> • • •
>
> MISS WILLIAMS: I want the record to reflect, number one, as I have repeatedly advised this Court, that the defendant Chesimard has a bullet in her chest, and her median nerve is severed and that five people, five U.S. Marshals, grabbed her as if she were an animal. She made no threat. She was sitting alongside of me. She was making a direct statement to you, and I am not discussing the validity or the invalidity, the correctness or the incorrectness of the statement but she was making no move of any form of violence. • • • [*Id.* at 54.]
>
> • • •
>
> MISS WILLIAMS: In your presence, you permitted this woman to be pulled, dragged by her arm, and I am requesting an adjournment—this is my basic application—for her to be ob-

In other words, this was not a case of purposeful and planned action by petitioner after deliberation in an atmosphere of calm and tranquility.

—There were racial overtones to the trial.[8] (Petitioner and the two defendants were black.) Whether articulated or not, there undoubtedly was a great deal of pressure upon petitioner to demonstrate in forceful terms her undivided loyalty to her client's cause.

—It would be hard to overstate the serious nature of the offenses against which petitioner had the responsibility to defend her client—a factor that obviously weighed heavily upon her conscience and affected both her judgment and her course of conduct.

—Both before and after the "finding" of contempt during the trial, petitioner repeatedly showed respect

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served by a doctor, for whose expense I will pay, to determine whether or not the seriousness of the injury caused by these U.S. Marshals pulling her arm and dragging her from her chair—[*Id.* at 56. See also *Id.* at 43-44, 48, 61, 62.]

The physical mishandling apparently even extended to petitioner: "MISS WILLIAMS: You know, my arm, in fact, is hurt from the abuse of these people." (12/5/73 Tr. 32.)

[8] For example:

DEFENDANT CHESIMARD: Because I am black, because I am poor—[*Id.* at 31.]

* * *

DEFENDANT CHESIMARD: * * * There is no justice in America, not for black people, not for poor people, not for anybody except for rich people—[*Id.* at 43.]

Chesimard charged that the judge had "repeatedly acted in ways that do not suggest but prove racism" (12/4/73 Tr. 27). She directly told the judge: "You are a racist * * *" (12/5/73 Tr. 30). There was also a reference to the Black Liberation Army (12/4/73 Tr. 33).

for the court.[9] The unfortunate episodes seized upon by the District Court, in other words, were regrettable lapses in an otherwise respectful attitude by petitioner.

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[9] For example:

> MISS WILLIAMS: Your Honor, may I, before we begin, extend my apologies to the Court for being late. • • • [12/4/73 Tr. 2.]
>
> • • •
>
> MISS WILLIAMS: Your Honor, I think that the Court has made many statements that certainly necessitate, as far as I am concerned, as counsel for the defendant Chesimard, a small response, a limited reply.
>
> I do not intend or anticipate taking up the time of the Court. • • • [*Id.* at 60.]
>
> • • •
>
> MS. WILLIAMS: • • • I can assure your Honor I have had many jury trials, and I attempt whenever possible to avoid that [making statements in the presence of the jury] because I understand the prejudicial impact of making those kinds of statements • • •. [12/5/73 Tr. 13-14.]
>
> • • •
>
> MS. WILLIAMS: Now may I respectfully request that I have an opportunity to speak to my defendant my client prior to any further proceedings in this court. [*Id.* at 15.]
>
> • • •
>
> MS. WILLIAMS: Will the Court please hear my application. • • • If the Court would like for the jurors to be removed during my presentation of the application, that is perfectly satisfactory to me—[*Id.* at 32.]
>
> • • •
>
> MS. WILLIAMS: May I respectfully request the Court that I be given an opportunity to speak to my client in privacy. [*Id.* at 36.]
>
> • • •
>
> MS. WILLIAMS: Your Honor, I have an application on the part of the defendant Chesimard. If the Court would prefer that the jury be excused during my application, then I would suggest that you do so. [*Id.* at 37.]
>
> • • •
>
> MS. WILLIAMS: • • • [M]ay I respectfully suggest to the Court that when you use the term "good behavior," and "good conduct," and "behaving yourself properly," that the Court please take cognizance of the fact that the Defendant Chesimard is on trial for her life in the State of New Jersey; that she is in preparation of that trial, and that I am her attorney

—Petitioner repeatedly did her best to silence her client and to prevent the very outbursts which so disturbed the court.[10]

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for that trial and in that trial, and various motions have been made to your Honor requesting your Honor's acceptance of the urgencies of judicial matters, which I think your Honor is well aware of. • • • [*Id.* at 45-46.]

• • •

MS. WILLIAMS: I will wait until all the jurors file out.

THE COURT: I am just waiting until all the jurors file out of the courtroom.

MS. WILLIAMS: Thank you, sir. [*Id.* at 60.]

• • •

THE COURT: • • • Incidentally, you are both directed to be here in Court tomorrow morning at 9:30.

MS. WILLIAMS: I accept the Court's direction. [*Id.* at 64.]

[10] For example:

THE COURT: Miss Williams, I urge you to suggest to your client that she remain silent?

MISS WILLIAMS: Your Honor, may I have a consultation?

DEFENDANT CHESIMARD: My attorney has advised me to be quiet. She has said that I should make no further statements, but I cannot accept that. • • • [*Id.* at 71.]

• • •

THE COURT: Miss Williams, will you advise your client to remain quiet?

DEFENDANT CHESIMARD: She has already gone through this, and she don't have to go through this again. I only have one life. He only has one life. [*Id.* at 77.]

• • •

DEFENDANT CHESIMARD: My attorney has suggested that I remain quiet. However, I cannot remain quiet. • • •

• • •

MS. WILLIAMS: • • • Your Honor, approximately 20 minutes ago I spoke to the Defendant Chesimard. • • • At that time she told me that she was willing to abide by the rules of the court to the best of her ability • • •. [*Id.* at 46.]

• • •

MS. WILLIAMS: Your Honor, I felt in all fairness—I wanted to do this outside—I have had an opportunity to talk to Miss Chesimard and I have advised that the Defendant Chesimard to remain silent; I have advised her to behave; and she has stated to me she will do so if she feels she can, and I simply in all honesty want your Honor to know that. [*Id.* at 37.]

Petitioner might well have demonstrated these and other factors if she had been given the hearing to which she was entitled. Instead, she was deprived of such a hearing—and of her right to defend herself against this criminal charge.

This Court has "long recognized the potential for abuse in exercising the summary power to imprison for contempt." *Bloom* v. *Illinois*, 391 U.S. 194, 202 (1968). This potential for abuse has become manifest in recent cases,[11] and in critical commentary.[12] It has led this Court to impose procedural safeguards against the arbitrary or unnecessary use of the summary criminal contempt power.

Thus, in *Taylor* v. *Hayes*, 42 U.S.L.W. 5180 (U.S. June 26, 1974), the Court held that an attorney-contemnor was denied due process when he was convicted and sentenced for criminal contempt after trial with-

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[11] In a study conducted by a special committee of the Association of the Bar of the City of New York, all published cases of summary contempt from 1960 to 1972 were analyzed. This analysis showed that of the seventy-two cases in which the trial judge imposed summary punishment, forty (more than 60%) were later reversed on appeal. Twenty-three of the reversals were on the merits. Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court*, 233-234 (1973).

[12] Note, Criminal Law—Contempt—Conduct of Attorney During Course of Trial, 1971 *Wis. L. Rev.* 329; Dobbs, Contempt of Court: A Survey, 56 *Cornell L. Rev.* 183 (1971); Note, Supreme Court Narrows Scope of Summary Procedures in Federal Criminal Contempt Convictions, 1966 *Duke L. J.* 814; Note, Procedures for Trying Contempts in the Federal Courts, 73 *Harv. L. Rev.* 353 (1959); Keller, Civil and Criminal Contempt, 43 *N.Dak.L.Rev.* 244 (1967); E. Dangel, Contempt §§ 14, 198-211 (1939); R. Goldfarb, *The Contempt Power*, 46-100 (1963); Note, Summary Proceedings in Direct Contempt Cases, 15 *Vand. L. Rev.* 241 (1961); Note, Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal, 39 *S. Cal. L. Rev.* 463 (1966); Lane, The Contempt Power v. The Concept of a Fair Trial, 50 *Ky. L. J.* 351 (1962).

out being afforded an opportunity to offer a defense before he was finally adjudged guilty. This was true even though the attorney-contemnor had an opportunity on several occasions to respond to the charges against him (*id.* at 5183). In describing the proceedings after the contempt citations, this Court stated:

> * * * no sentence was imposed during the trial, and it does not appear to us that any final adjudication of contempt was entered until after the verdict was returned. It was then that the court proceeded to describe and characterize petitioner's various acts during trial as contemptuous, to find him guilty of nine acts of contempt and to sentence him immediately for each of those acts. [*Id.*[13]]

Precisely the same was true here. No sentence was imposed during trial, and the Certificate of Contempt —which cited quite different grounds than the one referred to at trial—was not served until well after the trial was over. Moreover, as pointed out above, the instant situation, as in *Taylor,* was not one in which violence or other destructive behavior required the immediate employment of the summary contempt power, and the District Court recognized as much in its Certificate of Contempt,[14] as well as by its postponement of both the sentencing and the formulation of contempt charges.

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[13] It is significant that *Taylor* was nowhere mentioned by the Court of Appeals even though petitioner had informed the court in her brief on appeal that this Court had granted certiorari in the *Taylor* case. Nor did the United States ever mention or deal with the *Taylor* case.

[14] According to the Certificate, petitioner made the preservation of order in the courtroom not impossible but "an exceedingly difficult task," and it was "[t]he *potential* effects of the *continuation* of this behavior" which seemed to the court to require action (App. A; emphasis added).

When the need for the peremptory power to punish is absent, a summary procedure to determine guilt is not justified.[15] Thus, in *Cooke* v. *United States,* 267 U.S. 517 (1925), this Court declared:

> Punishment without issue or trial [is] so contrary to the usual and ordinary indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court [is] required to justify the exception; *but the need for immediate penal vindication of the court created it.* [*Id.* at 536; emphasis added.]

And in *Taylor,* this Court stated: "where conviction and punishment are delayed 'it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business,' " 42 U.S.L.W. at 5184, quoting *Groppi* v. *Leslie,* 404 U.S. 496, 504 (1972). Petitioner submits that whenever summary punishment is not needed, *Taylor* mandates that a summary procedure is not permissible.[16]

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[15] This Court has long affirmed the principle that a court must "exercise the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 19 U.S. (6 Wheat.) 204, 231 (1821); see also *In re Michael,* 326 U.S. 224, 227 (1945); *Shillitani* v. *United States,* 384 U.S. 364, 371 (1966). Disruptions amounting to less than violence can be handled by the trial judge through the use of any of the weapons in his "arsenal of authority" as set forth by this Court in *Allen* v. *Illinois,* 397 U.S. 337 (1970). See also *Bloom* v. *Illinois, supra,* 391 U.S. at 208.

[16] In discussing due process, the necessity for immediate punishment, and the jury trial right in summary criminal contempts, this Court declared in *Codispoti* v. *Pennsylvania,* 42 U.S.L.W. 5175, 5178 (U.S. June 26, 1974):

> When the trial judge, however, postpones until after trial the final conviction and punishment of the accused or his lawyer for several or many acts of contempt committed during the trial, there is no overriding necessity for instant action to preserve order and no justification for dispensing with the ordinary rudiments of due process. • • •

This is borne out by the Court's reversal of *Grossman* v. *Striepeke*, No. 72-2526 (9th Cir., filed July 11, 1973), reversed and remanded 42 U.S.L.W. 3710 (U.S. July 8, 1974). The contempt occurred in a California state court trial (*see In re Grossman*, 24 Cal. App. 3d 624, 101 Cal. Rptr. 176 (1972)) in which, as here, the court during trial cited an attorney for misconduct but delayed the formal charge and sentencing until the conclusion of the trial. The attorney in that case in a "loud, disorderly, contemptuous, insolent and rude manner and tone of voice" accused the court of exercising different standards for the prosecution and defense, and in a "loud, disorderly, contemptuous, insolent and rude manner and tone of voice" accused the court of calling him a liar. The trial court held that these acts not only were grossly contemptuous but "tended to and did interrupt the due course of the trial." The state appellate court likewise concluded that the attorney's conduct constituted an "imminent not merely a likely threat to the administration of justice" (24 Cal. App. at 634-635, 638, 101 Cal. Rptr. at 183, 185-186). The Ninth Circuit agreed with the state appellate court in all respects and affirmed the District Court's denial of habeas corpus relief (see slip opinion at 3). Nevertheless, this Court summarily reversed and remanded for further consideration in the light of *Taylor*. See 42 U.S.L.W. 3710.

We submit that *Grossman* as well as *Taylor* are controlling here. In the instant case there are not even the aggravating factors of the loud and disorderly voice which was part of the contempt in *Grossman*, or of the "deceit," "trickery," "planned confusion," disrespect in voice, and waving of arms at a witness in a

derogatory manner that were part of the contempt in *Taylor*.[17]

It is particularly vital for a contemnor to be accorded a hearing whenever possible because an *intent* to obstruct the administration of justice is an essential element of the offense of criminal contempt. *See, e.g., United States* v. *Seale*, 461 F.2d 345, 367-369 (7th Cir. 1972). This Court has clearly recognized this principle in cases in which the alleged contemnor's state of mind or mental condition was specifically put in issue. *Panico* v. *United States*, 375 U.S. 29 (1963); *Harris* v. *United States*, 382 U.S. 162 (1965). It is settled law, moreover, that all necessary elements of the offense of criminal contempt must be proven beyond a "reasonable doubt."[18]

Although the conduct of an attorney could permissibly be found obstructive, it may nevertheless be immune from criminal contempt charges if undertaken in the good faith defense of a client's cause.[19] In *United States* v. *Sopher, supra,* for example, counsel made certain misstatements of material facts and inferences in his closing argument to the jury. Government objections were sustained, and after the verdict Sopher was adjudged in contempt as a result of his behavior.

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[17] In fact, Judge Gagliardi specifically found that "The conduct of the respondent [petitioner here] while undeniably disruptive did not possess the tone of personal vilification present in the cases relied on by the respondent" (App. B, p. 5a).

[18] *Bloom* v. *Illinois, supra; Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 444 (1911); *In re Van Meter*, 413 F.2d 536 (8th Cir. 1969); *Yates* v. *United States*, 316 F.2d 718 (10th Cir. 1963); *Cliett* v. *Hammonds*, 305 F.2d 565 (5th Cir. 1962).

[19] *United States* v. *Sopher*, 347 F.2d 415 (7th Cir. 1965); *Parmelee Transportation Co.* v. *Keeshin*, 292 F.2d 806 (7th Cir. 1961); *Sprinkle* v. *Davis*, 111 F.2d 925 (4th Cir. 1940) (dictum). See also, *Hallinan* v. *United States*, 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951); *Laughlin* v. *United States*, 151 F.2d 281 (D.C. Cir.), *cert. denied*, 326 U.S. 777 (1945).

While the circuit court was willing to concede that counsel's beliefs regarding the statements and inferences were *not* reasonable, the court nonetheless reversed.

> No doubt, as a member of the bar, he owed the court a more careful appraisal of the record * * * before advancing the argument he attempted. But in our judgment, his failing in this respect is too tenuous a basis to support a finding of contempt. *Positive evidence of a deliberate intent to pursue a course of improper argument or prohibited conduct is absent.* [347 F.2d at 418; emphasis added.]

The concept that an attorney may not be adjudged in contempt for aggressive but respectful advocacy was firmly established in *Holt* v. *Virginia,* 381 U.S. 131 (1965). If given an opportunity, petitioner in the instant case undoubtedly could show that her conduct arose in fact out of just such a good-faith, if overzealous, intent to protect her client's right to a fair trial.

This issue of fact—petitioner's intent—was summarily determined by Judge Gagliardi, however, in a ruling adverse to the petitioner. Prior to this determination petitioner was not afforded reasonable notice or a full hearing with the aid of counsel to offer evidence as to the reasons for her actions.[20] Summary conviction for criminal contempt without a hearing is

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[20] It is quite clear that petitioner was not afforded such a hearing. During the trial, the court asked her whether "you have anything to say in defense of your contumacious conduct in this court." Petitioner denied she was in contempt: "I do not accept your characterization of my conduct as contumacious" (12/5/73 Tr. 54). Without further ado, the court proceeded to hold her in contempt (*id.*). When petitioner appeared for sentencing on December 18, 1973, the court served her with a copy of the Certificate of Contempt and denied her motion for a hearing before another judge (App. B).

premised on the assumption that the trial judge has seen or heard all the elements of the allegedly contemptuous conduct. But a judge cannot perceive good faith or the absence thereof; he must infer it from overt conduct. When, as here, the alleged contemnor's conduct does not pose such a threat that immediate punishment is essential, no justification remains for denying the alleged contemnor a full hearing on the issue of intent.[21]

As noted, such a hearing is particularly vital in the case of alleged attorney-contemnors. As a crucial actor in the adversary system, defense counsel necessarily owes both a duty to that system to refrain from disorderly conduct[22] and a duty to represent vigorously his client's cause.[23] This dual mandate, particularly in criminal trials with racial or political overtones, occasionally thrusts the trial lawyer into a situation where he risks breach of one or the other of his obligations (*id.*). In such circumstances, the actual intent of the attorney in acting as he does is central to a

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[21] This Court in the past has recognized that the alleged contemnor's mental state may not be conclusively and infallibly determined by the trial judge who observes the actions of the alleged contemnor. In *Panico* v. *United States, supra,* this Court reversed the summary conviction for contempt of a criminal defendant, noting that no hearing had been held into the mental condition of the defendant at the time of the alleged contemptuous acts. In *Harris* v. *United States, supra,* the summary conviction of a grand jury witness was reversed. This Court, in affirming the importance of a hearing into the intent which underlay the alleged contemnor's silence, declared: "what appears to be a brazen refusal to cooperate with the grand jury may indeed be a case of frightened silence" (382 U.S. at 166).

[22] See *ABA Code of Professional Responsibility,* Canon 7, wherein 21 ethical considerations are listed under the heading, "Duty of the Lawyer to the Adversary System."

[23] See *ABA Code of Professional Responsibility,* Canon 7, wherein 15 ethical considerations are listed under the heading, "Duty of the Lawyer to a Client."

fair and proper consideration of whether criminal liability should attach to his acts. That petitioner rightly or wrongly understood her acts to be necessary to the proper defense of her client is apparent from the trial record (12/5/73 Tr. 54). That petitioner repeatedly sought, despite serious lapses, to treat Judge Gagliardi with respect and deference is also apparent from the trial record (see n. 9, *supra*). At the very least, petitioner was entitled to an opportunity to demonstrate whatever the facts were that led her to act as she did.

2. Petitioner was denied due process by a summary finding and sentence for criminal contempt by a judge who was not impartial and disinterested.

When she appeared for sentencing, and also on the following day, petitioner moved for a hearing before a judge other than Judge Gagliardi. These motions were denied (App. B), and petitioner was thereby deprived of due process under the Fifth Amendment.

The governing principle was succinctly stated in *Cooke* v. *United States, supra,* 267 U.S. at 539:

> * * * where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

Taylor and other later cases have made clear that it is only in the exceptional case, where summary guilt and sentence are required in order to prevent an immediate obstruction of justice, that another judge need not sit. We have already demonstrated that this is not such a case.

But this Court has developed two additional constitutional principles which are also applicable here.

One is that an accused is entitled to a hearing before a tribunal which not only is neutral and fair in fact but which assures the appearance of neutrality and fairness.[24] Thus, even if a judge has no actual bias, if the setting and circumstances are such that it would appear to be impossible or even difficult to "weigh the scales of justice equally between contending parties" (*In re Murchison, supra,* 349 U.S. at 136), the decisional process should be given to another, uninvolved judge. There is all the more reason for a judge not to sit when, because of the nature of the friction, he himself is one of the "contending parties." This is true even where there is only "a possible temptation * * * not to hold the balance nice, clear and true * * *." *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1928).

The other relevant principle developed by this Court is that when a judge becomes "personally embroiled" in controversy with the alleged contemnor, or if the allegedly contemptuous conduct may so provoke the judge as to "embroil him in controversy," he should not sit on the issue of criminal contempt. *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 465 (1971); *Taylor* v. *Hayes, supra,* 42 U.S.L.W. at 5184-85; *Offutt* v. *United States, supra,* 348 U.S. at 13-14. Thus, where a controversy between attorney and judge leaves "personal stings," or where there are "marked personal feelings * * * on both sides," another judge should be brought in. *Taylor* v. *Hayes, supra,* 42 U.S.L.W. at 5185. This is particularly true where the judge has been the victim of "an insulting attack" and has had "fighting words" leveled at him. *Mayberry* v. *Pennsylvania, supra,* 400 U.S. at 465.

In this case, Judge Gagliardi, to his face, was called by the defendants "corrupt" "bigoted," "unintel-

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[24] *Offutt* v. *United States,* 348 U.S. 11, 14 (1954); *In re Murchison,* 349 U.S. 133, 135-136 (1955); *Taylor* v. *Hayes, supra,* 42 U.S.L.W. at 5184-85; *Ungar* v. *Sarafite,* 376 U.S. 575, 588 (1964).

ligent," "unfair," "insane," an "errand boy," a "racist" and an "executioner." One defendant said to him: "Fuck you man—." The defendants charged that the judge was violating the rules of humanity and that he was lynching them. At least seven times they accused him of railroading them. Despite the defendants' frequent and prolonged absences from the courtroom, we have counted over 100 instances in which they interrupted the proceedings during the course of only two days of trial.

Many of the defendants' taunts and jibes were made in front of the jury, which must have added to the judge's consternation and perhaps to his humiliation. Nor were these isolated epithets; they were part of a series of such prolonged, vituperative and insulting outbursts that on six separate occasions the defendants had to be forcibly removed. One does not have to stretch any imaginations in order to visualize the judge's frustration at such outrageous conduct.

On top of this, the judge was faced with an attorney who was at one and the same time physically and emotionally exhausted, combative, convinced of the judge's unfairness, and at times angry—an attorney who did not respond to the judge's instructions in a manner that satisfied him and who undoubtedly contributed to his pique and frustration.

Some judges maintain their control *visibly* better than others. That undoubtedly occurred here. One can only sense the judge's inner feelings from the printed record; his words do not spell out in specific detail his anger or spite. But if impartiality could be determined from words alone, those judges who seem controlled but who in fact are suppressing strong adverse feelings could vent their spleen on alleged contemnors with impunity. There would be no impartial, detached and disinterested tribunal to determine whether a criminal act had in fact been committed, or

whether a judge had simply retaliated against someone who has confounded him.

In the light of the record in this case, could any one possibly doubt that, at the very least, there was, in the words of *Taylor,* "a likelihood of bias or an appearance of bias?" The common sense observation in *Offutt* v. *United States, supra,* 348 U.S. at 14, is so relevant here:

> * * * [J]udges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where contempt charged is entangled with the judge's personal feelings against the lawyer.

The District Court and the Court of Appeals seemed to feel that the situation was different where the primary aggravation came from the client rather than her attorney. But if a judge is angry and aroused when he makes his crucial decision in regard to guilt and sentence, what difference does it make who or what caused his loss of perspective? And who is to say that a judge, angry at a client, has totally disassociated that client from his attorney?[25]

The only fair—and constitutional—result in this case would have been for petitioner's motion for a hearing before another judge to have been granted.

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[25] As the Seventh Circuit said in *In re Dellinger,* 461 F.2d 389, 396 (1972), in ordering a contempt hearing before a different judge:

> Additionally, it would be artificial to view the conduct of either defense counsel in isolation from that of the other since defense counsel mutually supported each other's activities or, for that matter, in isolation from the concededly disqualifying disrespect of the other defendants since the conduct of all the defendants here was inextricably interwoven.

3. Petitioner was denied due process by not being sufficiently informed of the charges against her and by a failure to charge an actual criminal offense.

When petitioner appeared for sentencing, she was served with a Certificate of Contempt drawn up by Judge Gagliardi. This Certificate is required by Rule 42(a) and constitutes the formal charge against an alleged contemnor. Since, as this Court said in *Bloom* v. *Illinois, supra,* 391 U.S. at 201, criminal contempt is a crime in every fundamental respect,[26] the recitation of facts in the Certificate is of critical importance because "a criminal contempt order like any other conviction of crime must stand or fall on the sufficiency of the specifications of wrongdoing upon which it is based."[27]

In *United States* v. *Marshall, supra,* the Court of Appeals for the Ninth Circuit emphasized the importance of the factual citation in the contempt cer-

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[26] See also *New Orleans* v. *The Steamship Co.*, 87 U.S. (20 Wall.) 387, 392 (1874) ("[c]ontempt of court is a specific criminal offence"); *O'Neal* v. *United States*, 190 U.S. 36, 38 (1903) (an adjudication of contempt is "in effect a judgment in a criminal case"); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 326 (1904) (a criminal contempt proceeding is "criminal in its nature * * *"); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U.S. 42, 66 (1924) ("[t]he fundamental characteristics of both [crimes and criminal contempts] are the same").

Consistently with the above holdings, this Court has held that a defendant in a criminal contempt proceeding is eligible for executive pardon, *Ex. parte Grossman*, 267 U.S. 87 (1925); is entitled to the protection of the statute of limitations, *Gompers* v. *United States*, 233 U.S. 604, 611-613 (1914); *Pendergast* v. *United States*, 317 U.S. 412 (1943), and in certain circumstances may have a trial by jury. *Bloom* v. *Illinois, supra.*

[27] *Tauber* v. *Gordon*, 350 F.2d 843, 845 n.1 (3rd Cir. 1965). See also *United States* v. *Marshall*, 451 F.2d 372, 374 (9th Cir. 1971), and *Hallinan* v. *United States, supra*, 182 F.2d at 882 ("if the judgment is to be sustained the conduct complained of in the certificate must itself constitute contempt").

tificate, particularly when the alleged contemnor has been convicted without notice or hearing. That court stated:

> "[I]nformed appellate review" is possible only if the facts are stated in sufficient detail for the appellate court to determine whether the conduct upon which the conviction rests was contemptuous, factually and legally; whether it was of such character, and occurred in such circumstances, as to permit summary conviction under Rule 42(a), and because Rule 42 sentences are subject to appellate review and revision, whether the conduct relied upon justified the sentence imposed. [*Id.* at 375; footnotes omitted.]

In *Tauber* v. *Gordon, supra,* the Court of Appeals for the Third Circuit reached a similar conclusion when it observed that the requirement of a proper certificate in a Rule 42(a) contempt "is more than a formality. It is essential to disclosure of the basis of the decision with sufficient particularity to permit an informed appellate review." 350 F.2d at 845.

In the instant case the basis upon which the trial judge acted is similarly unknown because of his incorporation of the entire trial record into the contempt charge and because of his vague references to petitioner's "acts, statements and conduct." Thus, for example, whether his action was in part grounded upon an improper emotional reaction to petitioner's unsuccessful attempts to restrain her client is left entirely unclear—both to this Court and to petitioner. Under the Fifth Amendment a criminal pleading must allege a complete statement of all elements of the statutory offense and include a complete recital of defendant's conduct for each statutory element of the crime. See Note, *Indictment Sufficiency,* 70 Col.L.Rev. 876, 896 (1970) (and cases cited therein). To the extent that

the Second Circuit approved the Certificate here, its decision conflicts with *United States* v. *Marshall, supra,* as well as with *Weiss* v. *Burr,* 484 F.2d 973, 983-984 (9th Cir. 1973).

The Certificate in the instant case was constitutionally invalid in at least three respects.

(a) One specific act (a refusal to return to counsel table) was cited to petitioner and apparently relied upon by the District Court at the time petitioner was originally cited for contempt, whereas an entirely different set of alleged contemptuous "acts, statements and conduct" were cited to petitioner in the Certificate of Contempt and apparently relied upon by the District Court at the time of sentencing. The facts in regard to this fatal variance have been spelled out above (pp. 9-11). We need only add here that even if petitioner had been given an opportunity to defend herself—which she was not—she would not have known in this case what to defend against. The Fifth Amendment's requirements of specificity were completely ignored by the District Court, and total confusion was injected into what should have a clear, concise and specific charge of contempt.

(b) Analagous to the above point is the further one that the District Court erroneously made "the entire record of the trial" a basis for his contempt charge. This was tantamount to accusing a person of stealing by virtue of his entire course of conduct over a period of a week. There was no way whatever that petitioner could face and refute the charge against her on the basis of "the entire record of the trial"—which presumably included everything from opening comments to the jury verdict.

(c) The Certificate failed to allege an actual obstruction of justice, and none occurred.

The statute under which petitioner was convicted and sentenced to imprisonment proscribes in-court behavior which "obstruct[s] the administration of justice." 18 U.S.C. § 401(1). This statute was intended by Congress to be a "drastic delimitation * * * of the broad undefined power of the inferior federal courts under the Act of 1789," *Nye* v. *United States,* 313 U.S. 33, 45 (1941), and revealed "a Congressional intent to safeguard Constitutional procedures by limiting courts * * * to 'the least possible power adequate to the end proposed'." *In re Michael, supra,* 326 U.S. at 227.

In recognition of this intent to delimit, this Court has long required that the alleged contemptuous acts cited in a Rule 42(a) certificate must constitute an actual and not merely a potential obstruction of justice. *E.g.,* In *Ex parte Hudgings,* 249 U.S. 378 (1919). Thus, in *In re McConnell,* 370 U.S. 230 (1962), an attorney persisted in asking certain questions in direct defiance of a ruling by the trial judge. In reversing the summary conviction of the attorney for contempt this Court declared:

> We agree with Judge Duffy who dissented below that there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice. It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that "we propose to do so unless some bailiff stops us." The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary

> contempt which Congress has granted to the Federal courts. The argument of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here. [370 U.S. at 235-236.[28]]

The conclusion of this Court in *In re McConnell* is equally applicable to the case at bar. None of petitioner's behavior during the trial was "conduct sufficiently disruptive of the trial court's business to be an obstruction of justice."

Here, nowhere in the Certificate did the trial judge certify and charge that the complained of conduct constituted an actual obstruction of justice. In the crucial paragraph the Certificate stated only that summary contempt was required because of "the potential effects of the continuance of this behavior on the administration of justice * * *." The court further noted only an "attempt" to "sabotage the orderly administration of justice" with the result that the maintenance of order was "an exceedingly difficult task." Research has disclosed no cases suggesting that an "attempted contempt" is a crime, and the difficulty of maintaining order is irrelevant unless an actual obstruction has occurred. It is axiomatic that nothing in a criminal pleading can be charged by implication. See, *e.g., Etheredge* v. *United States,* 186 Fed. 434 (5th Cir. 1911); *Chow Bing Kew* v. *United States,* 248 F.2d 466 (9th Cir.), *cert. denied,* 355 U.S. 889 (1957).

Moreover, the facts belie any actual obstruction. First, at the time of the alleged contempt, the two defendants had already been removed from the court-

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[28] See also *In re Little,* 404 U.S. 553 (1972).

room, and no final resolution of that problem had been reached. Secondly, petitioner did not actually leave the courtroom at the time of the alleged contempt. When she did leave, she did so with the permission of the court. Thirdly, the trial continued to its normal conclusion after the alleged contempt. Finally, if the Certificate of Contempt controls, conduct during the entire trial constituted the contempt, and obviously such conduct could not have amounted to an actual and imminent obstruction of justice.

As pointed out above, both by the wording of the Certificate and by the decision to postpone sentencing, the court made clear that no actual obstruction of justice occurred. That being so, no crime was committed.

CONCLUSION

For each and all of these reasons, we respectfully urge the Court to grant certiorari and reverse the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Cr. 572

UNITED STATES OF AMERICA EX REL.
JUDGE LEE P. GAGLIARDI
v.
EVELYN WILLIAMS, ESQ.

Certificate of Contempt

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure and pursuant to Title 18, United States Code, Section 401, I hereby certify that I saw and heard the conduct set forth below, which conduct occurred in the actual presence of the Court during the trial of the case entitled United States of America v. Joanne Chesimard, et al., 73 Crim. 572, which trial commenced on December 4, 1973.

I find that the acts, statements and conduct of the counsel for defendant Chesimard, Evelyn Williams, Esq., hereinafter specified, constitute a contempt of this Court and a deliberate and wilful attempt to sabotage the orderly administration of justice; that this misconduct was of so grave a character as to disrupt the proper functioning of this Court. Ms. Williams has, by reason of her conduct, made the maintenance of the dignity of this Court and the preservation of order in the courtroom an exceedingly difficult task. Despite warnings to Ms. Williams to cease this conduct and an explanation of the possible consequences of her actions, Ms. Williams persisted in her disruptive and contumacious behavior. The potential effects of the continuation of this behavior on the administration of justice in this case necessitate that I deal with Ms. Williams' activities at this time. Inasmuch as no single reference or series of references to the transcript can accurately reflect the

extent of Ms. Williams' contemptuous conduct, I hereby make the entire record of the trial a part of these proceedings. In addition to the specific conduct set forth below and in the portions of the transcript appended hereto the Court notes that Ms. Williams has continually, during the course of the trial, conducted herself in a manner at times calculated to display her disrespect for this Court and these proceedings.

Accordingly, it is adjudged that Evelyn Williams, Esq. is guilty of the criminal contempt hereinafter described.

I.

On December 4, 1973, shortly before the conclusion of the Court's afternoon session, the defendant Joanne Chesimard was excluded from the courtroom following a series of outbursts on her part. After the defendant Chesimard was escorted from the courtroom, Ms. Williams engaged in a colloquy with the court concerning the exclusion of the defendant and the court's ruling concerning the form in which objections were to be made in the presence of the jury. During the course of this colloquy Ms. Williams not only took formal exception to the court's ruling but announced that she would not submit to the direction of the court in this regard. Towards the conclusion of this exchange Ms. Williams, although insisting that she continued to represent the defendant Chesimard, stated that she would not participate further in the proceedings. Having made this statement and despite the explicit direction by the court to remain in the courtroom, seated at the counsel table and a warning by the court as to consequences of her contumacious conduct, Ms. Williams left the courtroom. At the time Ms. Williams absented herself, court was in session and the jury selection was in progress. Shortly after Ms. Williams left the courtroom, the trial was adjourned until 9:30 A.M. the following morning.

Court resumed on the morning of December 5, 1973; Ms. Williams did not appear. Ms. Williams was contacted during the course of the morning and directed to be in

court at 2 P.M. During the course of the proceeding, defendant Chesimard was again removed from the courtroom following a repetition of her outbursts of the previous afternoon. After the removal of defendant Chesimard, Ms. Williams again engaged in a colloquy with the court. Ms. Williams told the court that she would not listen to any statement made by the court and despite repeated direction to remain at the counsel table she made her way to the rear door in an attempt to leave the courtroom. At this juncture, the marshalls, acting at the court's direction, locked the exits to the courtroom. The colloquy continued with Ms. Williams standing at the rear door of the courtroom. The court directed Ms. Williams to return to the counsel table; she refused. The court warned Ms. Williams that she would be cited for contempt if she persisted in her conduct; she indicated that she was aware of the possible consequences of her actions. The court offered Ms. Williams the opportunity to purge herself of her contempt; she declined. The court asked Ms. Williams if she had anything to say in defense of her contumacious conduct; she stated that she did not consider her conduct contumacious. At this point, the court held Ms. Williams in summary contempt for failure to obey the legal order and directive of the court.

• • •

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure and pursuant to Title 18, United States Code, Section 401 I find that Evelyn Williams, Esq. has, by her acts, statements and conduct, committed acts of contempt, constituting a deliberate and wilful attack upon the administration of justice and with the professed intent of disrupting the proper functioning of this court.

So ordered.

/s/ LEE P. GAGLIARDI
U.S.D.J.

Dated: New York, New York
December 5, 1973

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 40189

UNITED STATES OF AMERICA EX REL.

JUDGE LEE P. GAGLIARDI

v.

EVELYN WILLIAMS, ESQ.

Memorandum Decision

GAGLIARDI, D.J.

On December 5, 1973, during the course of the trial of United States v. Joanne Chesimard and Fred Hilton, 73 Crim. 572, respondent Evelyn Williams, attorney for defendant Chesimard, was held in summary contempt pursuant to the provisions of Rule 42(a), Fed. R. Crim. P. and 18 U.S.C. S 401. The imposition of sentence on the contempt citation was deferred until the end of the trial of defendants Chesimard and Hilton. On December 18, 1973, respondent Williams appeared before the court for sentencing; at that time respondent was served with a copy of the formal certificate of contempt. At that hearing respondent moved for an order assigning the contempt charge to another judge for the purposes of a jury trial pursuant to Rule 42(b) Fed. R. Crim. P. and 18 U.S.C. S 482. On December 19, 1973, respondent made the instant motion to vacate the certificate of contempt and to assign the cause to another judge for trial by jury. The motion is not addressed to the merits of the contempt citation but rather to the procedure pursuant to which respondent was adjudicated in contempt. Essentially, Ms. Williams contends that the court was "personally embroiled" under the standards of *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) and that, therefore, the court should disqualify itself from presiding

over further proceedings in the matter. In *Mayberry,* the court held that where a judge becomes personally embroiled with the contemnor *and* delays "treatment" of the contempt until after the close of the trial the matter is more appropriately dealt with by assignment to another judge. The circumstances of the instant case are clearly different from those in *Mayberry.*

The respondent Williams was held in contempt for attempting to leave the courtroom during the course of jury selection in the Chesimard-Hilton trial and in violation of a direct order by the court to remain at counsel table. Conduct of this type is fundamentally contemptuous. Beyond cavil, an attorney may not be permitted to frustrate the orderly administration of justice by walking out of the courtroom during the course of a judicial .proceeding. Judged by any standard, the action itself is contemptuous irrespective of the words.

While it is clear that under the strictures of *Mayberry* as well as under the holdings of *United States* v. *Seale,* 461 F.2d 345 (9th Cir. 1972) and *in re Bellinger,* 461 F.2d 389 (7th Cir. 1972), a judge who is "personally embroiled" should recuse himself from a post-trial contempt proceeding, I find that the instant case does not raise the issue of personal embroilment. The conduct of the respondent although contumacious cannot be characterized as an attack on the personal integrity of the trial judge. *Mayberry, Seales* and *Dellinger* involve trials punctuated by repeated verbal attacks on the presiding judges in the most shocking and slanderous terms. The conduct of the respondent while undeniably disruptive did not possess the tone of personal villification present in the cases relied on by the respondent.

The respondent argues that the outbursts of the Defendant Chesimard, which were to some degree marked by verbal attacks on the personal integrity of the court, cre-

ated an atmosphere of hostility in the courtroom. The respondent concludes that as a result of the atmosphere the court was personally embroiled with both attorney and client and that, therefore, a jury trial on the issue of contempt is appropriate. Basically, the respondent is arguing that the court may be deprived of its power to hold an attorney in summary contempt irrespective of the attorney's conduct provided the conduct of the attorney's client is of a sufficiently disrespectful and disruptive nature as to be characterized as a personal attack on the trial judge. I decline to expand the existing definition of "personal embroilment" in the fashion suggested by the respondent. It is clear, therefore, that "personal embroilment" as defined in Mayberry is not presented in the instant case.

Moreover, unlike Mayberry, this case is not one of a post-trial adjudication of contempt. In Mayberry, the Court stressed the importance of the timing of the contempt citation, stating that where the judge delays treatment of the contempt until the close of the trial and the contempt involves a personal embroilment, it is advisable that the matter be assigned to another judge. The Court did not, however, define the phrase "treatment of the contempt." It is unclear whether the phrase "treatment of the contempt" means the citing of the contemnor or the sentencing of the contemnor. Cognizant of this ambiguity and mindful of the prejudice flowing to a defendant when his attorney is held in contempt, this court chose to follow a middle course — citing the respondent for contempt at the moment of her contumacious act and deferring imposition of sentence until the close of the trial. Having reviewed the papers submitted by counsel, I believe that the course was and is appropriate under the circumstances of the instant case.

In addition to contending that the court was personally embroiled with the contemnor, the respondent argues that because she is an attorney and therefore subject to grave

consequences as a result of a contempt citation, the matter should be treated under the provisions of Rule 42(b). While it is true that an attorney may suffer more serious consequences than a layman, it is equally true that an attorney is more familiar with courtroom procedure and etiquette and as an officer of the court is under a greater duty to observe those procedures. In addition, respondent declined to purge herself of her contempt when given the opportunity to do so. In view of the intransigent stance adopted by the defendant just prior to the contempt citation, I do not believe that the fact that she is an attorney requires that she be afforded treatment pursuant to 42(b). Accordingly, the instant motion is denied.

So ordered.

/s/ LEE F. GAGLIARDI

Dated: New York, New York
January 4, 1974.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Cr. 572

Judgment and Commitment

UNITED STATES OF AMERICA ex rel.

JUDGE LEE P. GAGLIARDI

v.

EVELYN WILLIAMS, ESQ.

EVELYN WILLIAMS, ESQ., having committed, in the presence and hearing of this Court, certain acts which are set forth in detail in the Certificate attached to this Order, it is

ADJUDGED, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant EVELYN WILLIAMS hereby is found to be in contempt of this Court, and is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 10 days.

In is ADJUDGED that execution of the sentence shall be stayed pending appeal to the Second Circuit Court of Appeals.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendam, and it is further

ORDERED that this Judgment shall be effective nunc pro tunc January 3, 1974.

Dated: New York, New York
February 5, 1974

/s/ LEE P. GAGLIARDI
United States District Judge

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1081—September Term, 1973.

(Argued June 11, 1974 Decided July 29, 1974.)

Docket No. 74-1227

In re EVELYN WILLIAMS, *Appellant.*

Before:

HAYS and MANSFIELD, *Circuit Judges,*
and BAUMAN, *District Judge.**

Appeal from the judgment of the United States District Court for the Southern District of New York, Lee F. Gagliardi, *Judge,* summarily convicting the appellant of criminal contempt of court pursuant to Fed. R. Crim. Proc. 42(a) and sentencing her to ten days imprisonment.

Affirmed.

LEROY D. CLARK, New York, New York (Evelyn Williams, pro se, New York, New York, James Larson, Arthur Kinoy, National Lawyers Guild, New York, New York, O. T. Wells, National Bar Association, New York, New York, William M. Kunstler, Center for Constitutional Rights, New York, New York, Hayward Burns, National Conference of Black Lawyers, New York, New York, on the brief), *for Appellant.*

JOHN D. GORDAN, III, Assistant United States Attorney, New York, New York (Paul J. Curran, United States Attorney, New York, New York, on the brief), *for Appellee United States of America.*

PER CURIAM:

Appellant, Evelyn Williams, an attorney, was cited for contempt of court by the District Court for the Southern

* Honorable Arnold Bauman of the United States District Court for the Southern District of New York, sitting by designation.

District of New York for her conduct while acting as defense counsel to Joanne Chesimard at the first of two trials of Chesimard and Freddie Hilton for bank robbery. In his certificate of contempt dated December 5, 1973, Judge Gagliardi adjudged Williams guilty of criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure and certified that the following events took place in his presence:

> "On December 4, 1973, shortly before the conclusion of the Court's afternoon session, the defendant Joanne Chesimard was excluded from the courtroom following a series of outbursts on her part. After the defendant Chesimard was escorted from the courtroom, Ms. Williams engaged in a colloquy with the court concerning the exclusion of the defendant and the court's ruling concerning the form in which objections were to be made in the presence of the jury. During the course of this colloquy Ms. Williams not only took formal exception to the court's ruling but announced that she would not submit to the direction of the court in this regard. Towards the conclusion of this exchange Ms. Williams, although insisting that she continued to represent the defendant Chesimard, stated that she would not participate further in the proceedings. Having made this statement and despite the explicit direction by the court to remain in the courtroom, seated at the counsel table and a warning by the court as to consequences of her contumacious conduct, Ms. Williams left the courtroom. At the time Ms. Williams absented herself, court was in session and the jury selection was in progress. Shortly after Ms. Williams left the courtroom, the trial was adjourned until 9:30 A.M. the following morning.
>
> "Court resumed on the morning of December 5, 1973; Ms. Williams did not appear. Ms. Williams was contacted during the course of the morning and di-

rected to be in court at 2 P.M. During the course of the proceeding, defendant Chesimard was again removed from the courtroom following a repetition of her outbursts of the previous afternoon. After the removal of defendant Chesimard, Ms. Williams again engaged in a colloquy with the court. Ms. Williams told the court that she would not listen to any statement made by the court and despite repeated direction to remain at the counsel table she made her way to the rear door in an attempt to leave the courtroom. At this juncture, the marshals, acting at the court's direction, locked the exits to the courtroom. The colloquy continued with Ms. Williams standing at the rear door of the courtroom. The court directed Ms. Williams to return to the counsel table; she refused. The court warned Ms. Williams that she would be cited for contempt if she persisted in her conduct; she indicated that she was aware of the possible consequences of her actions. The court offered Ms. Williams the opportunity to purge herself of her contempt; she declined. The court asked Ms. Williams if she had anything to say in defense of her contumacious conduct; she stated that she did not consider her conduct contumacious. At this point, the court held Ms. Williams in summary contempt for failure to obey the legal order and directive of the court."

On February 5, 1974, the court issued a judgment and commitment effective nunc pro tunc January 3, 1974, in which it restated its finding that Williams was guilty of criminal contempt, and sentenced her to ten days imprisonment. Williams appeals.

Williams does not contend that her behavior at the trial was not disruptive and contumacious. Rather, she claims that Judge Gagliardi was personally embroiled in the discourse resulting in the contempt, and that he thus erred in denying her application to refer the contempt proceed-

ing to another judge.[1] See *Offutt* v. *United States*, 348 U.S. 11, 18 (1954); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). However, on reading the record it is clear to us that Judge Gagliardi was not personally embroiled in any dispute with Williams. He exhibited patience and restraint in the face of stratagems calculated to bring the trial to a halt. Judge Gagliardi used the district court's summary contempt power only as a last resort to prevent Williams from in effect terminating the trial. His action was a perfectly appropriate response to an immediate challenge to the court's dignity and authority.

Williams claims that Judge Gagliardi was vilified at the trial to such an extent that he could not exercise independent judgment of the contempt. The record shows that the trial judge was indeed subjected to verbal abuse by Chesimard who called him "corrupt," "bigoted," "a racist" and "an agent for the CIA." But the record shows that he did not attribute Chesimard's remarks to Williams.

None of the other points advanced by the appellant has any merit.

Affirmed.

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[1] Upon oral argument Williams's counsel contended for the first time that Judge Gagliardi's Certificate of Contempt, which describes the background and conduct of Williams at the trial and the conduct found to be contemptuous, had not singled out the contumacious conduct relied upon as the basis for the Court's summary adjudication for contempt, thus hampering her ability to defend against the charge of contempt. This contention is meritless. The record is clear that Judge Gagliardi found Williams in contempt because she repeatedly refused to obey the Court's order to return to the counsel table, absenting herself from the Courtroom in defiance of that order.

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of August, one thousand nine hundred and seventy-four.

In the Matter of
EVELYN WILLIAMS, ESQ., *Appellant,*

USA, *Plaintiff*

v.

JOANNE CHESIMARD, ET AL., *Defendants*

It is hereby ordered that the motion made herein by counsel for the appellant dated August 6, 1974 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

Arnold Bauman, USDJ
Paul R. Hays
Walter R. Mansfield,
Circuit Judges

APPENDIX F

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York on the 13th day of September, one thousand nine hundred and seventy-four.

Present:
HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,

Circuit Judges.

In the Matter of
EVELYN WILLIAMS, ESQ., *Appellant.*

Docket No. 74-1227

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk